

# An Overview of Emerging International Human Rights Law Guidance: Promoting Human Rights Compatibility of Government COVID-19 Responses

BONAVERO REPORT No. 5/2020

17 AUGUST 2020

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# AN OVERVIEW OF EMERGING INTERNATIONAL HUMAN RIGHTS LAW GUIDANCE: PROMOTING HUMAN RIGHTS COMPATIBILITY OF GOVERNMENT COVID-19 RESPONSES

## I. Introduction

### a. Purpose of the Report

There are now a number of international and regional human rights, rule of law and democracy organisations that have developed general guidance on how Covid-19 measures should be evaluated for their compliance with international human rights law. This report aims to collate and briefly summarise the emerging content of such guidance. Due to the proliferation of such guidance, this report is limited to the most significant pieces.<sup>1</sup> It is organised thematically by reference to the following trends: accountability, emergencies and derogations, rights limitations (including privacy), socio-economic rights, discrimination, vulnerable persons, and enforcement powers and practice. This report thus provides a thematic overview of international human rights law guidance to legislatures, executives, courts and civil society in responding to the Covid-19 pandemic. In responding to Covid-19, States were initially tasked with applying and complying with international law without the benefit of tailored guidance; States had to make ‘difficult decisions’.<sup>2</sup> These initial government responses to Covid-19 (detailed in the Bonavero Institute of Human Rights’ Report 3/2020 on *A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions*)<sup>3</sup> require scrutiny and reconsideration.<sup>4</sup> In addition, the Covid-19 pandemic continues to evolve. At the time of publication, some States that have eased restrictions are facing a second wave of Covid-19. This will likely prompt a range of new legislative, executive and judicial measures or a revival of previous measures, both of which must conform with the guidance outlined in this report. Accordingly, this synthesis is particularly timely. However, the guidance is clear: State responses must match the needs of different phases of this crisis.<sup>5</sup> Accordingly, continuous and regular review of Covid-19 measures is fundamental to ensure States uphold human rights.

### b. Context

It is important to locate the evaluation of Covid-19 measures in the context of positive obligations attached to the right to life and right to health. States must adopt health strategies to address the medical dimensions of the Covid-19 pandemic. Indeed, States are required to take ‘extraordinary measures’ to protect and ensure the health and well-being of the

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<sup>1</sup> The IJRC has been extensively collating the [Covid-19 guidance from supranational human rights bodies](#).

<sup>2</sup> OHCHR, ‘COVID-19 Guidance’, 1.

<sup>3</sup> Henceforth, [Bonavero Report 3/2020](#).

<sup>4</sup> See further Parts II-V.

<sup>5</sup> OHCHR, ‘COVID-19 Guidance’, 2 (emphasis added).

population.<sup>6</sup> Public health goals are legitimate, with the Covid-19 pandemic currently posing a public health emergency in some states. However, and equally importantly, States must also respect, protect and fulfil the non-medical dimensions of human rights in the context of Covid-19, in the immediate, medium and long-term.<sup>7</sup> This report considers respect for human rights across the spectrum.

### **c. Scope**

This report is limited to international human rights law guidance specific to the Covid-19 pandemic. The guidance largely concerns obligations derived from the following treaties:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Covenant on the Elimination of Racial Discrimination (ICERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Rights of the Child (CRC)
- Convention on the Rights of People with Disabilities (CRPD)
- African Charter on Human and Peoples' Rights (ACHPR)
- American Declaration of the Rights and Duties of Man (ADHR)
- American Convention on Human Rights (ACHR)
- European Convention of Human Rights (ECHR)

These sources complement and work alongside domestic bills of rights and/or constitutions that may bind specific states.

There are, of course, important differences between international and regional human rights texts and institutions, and in their interpretation and application. However, in large part, we observed an overlapping consensus in the Covid-19 guidance. Readers are encouraged to consider the way in which that guidance will translate in each institutional setting and may need to consult the guidance itself for a full appreciation of that. A reference list is provided at the conclusion of this report. It must also be understood that this guidance is of a general nature and its precise application in an adjudicatory setting and to specific measures remains unclear and may lead to divergences.

## **II. Democratic Accountability**

Under international human rights law, executive accountability to Parliament and the electorate at large must be maintained despite the extraordinary measures imposed during a pandemic. Parliamentary scrutiny of executive measures is vital. While distribution of powers and checks

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<sup>6</sup> OHCHR, '[Emergency Measures Guidance](#)', 1.

<sup>7</sup> OHCHR, '[COVID-19 Guidance](#)', 1.

may be altered during the state of emergency, Parliaments must retain the power to control Executive action.<sup>8</sup> For example, the UN has recognised the empowerment or creation of ‘an independent or opposition-led parliamentary committee, which meets publicly online, to scrutinise executive action during the crisis’ as one instance of ‘best practice’.<sup>9</sup>

As one aspect of democratic accountability, the Office of the United Nations High Commissioner on Human Rights (OHCHR) has stressed the role of civil society in providing ‘targeted and candid feedback’ on Covid-19 measures. Accordingly, OHCHR has advised that States should *create* or *expand* avenues for participation and feedback, as well as ensure that existing channels of civil society participation are *maintained*.<sup>10</sup> The World Health Organisation (WHO) has also recalled that ‘oversight and accountability mechanisms should be in place to allow individuals who are impacted to challenge the appropriateness of those restrictions’.<sup>11</sup>

In the Bonavero Report 3/2020, reporters identified instances of novel intra-executive accountability.<sup>12</sup> It is noticeable that there has been little international guidance on forms of intra-executive accountability. There is, however, guidance on the broader commitment under international human rights law to facilitate participation in open, transparent and accountable government responses to Covid-19.<sup>13</sup> OHCHR recalls that: ‘People have a right to participate in decision-making that affects their lives. *Being open and transparent*, and involving those affected in decision-making is key to ensuring people participate in measures designed to protect their own health and that of the wider population, and that those measures also reflect their specific situations and needs.’<sup>14</sup>

### **III. Legal Accountability**

Under the international human rights principles of legality and rule of law, courts play an imperative role, which can be broken down into four rights:<sup>15</sup>

- a) The right to a fair trial by an independent and impartial court;
- b) The right to judicial control of deprivation of liberty;
- c) The right to an effective remedy; and
- d) The judicial role in ensuring the actions of the other branches of government respect the law (i.e. judicial review).

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<sup>8</sup> See, for e.g., [CoE Toolkit](#), [2.4] and IACHR, ‘[IACHR Calls for Guarantees for Democracy and the Rule of Law during the COVID-19 Pandemic](#)’.

<sup>9</sup> UN, ‘[COVID-19 and Human Rights: We are all in this together](#)’, 14.

<sup>10</sup> OHCHR, ‘[Civic Space and COVID-19](#)’, 1.

<sup>11</sup> WHO, ‘[Addressing Human Rights as Key to the COVID-19 Response](#)’.

<sup>12</sup> Bonavero Report 3/2020, 9.

<sup>13</sup> See Part VI below.

<sup>14</sup> OHCHR, ‘COVID-19 Guidance’, 4 (emphasis added).

<sup>15</sup> ICJ, ‘[ICJ Guidance](#)’, 1-2.

The International Commission of Jurists (ICJ) have published a detailed briefing note that considers the way courts of law are suspending ‘non-urgent’ cases, changing the modalities of hearings, and dealing with the consequences of postponement.<sup>16</sup> Regarding the suspension of ‘non-urgent’ cases, the ICJ was particularly concerned by the distinction between ‘urgent’ and ‘non-urgent’ cases. When determining which matters should be considered ‘urgent’, three matters are particularly significant:<sup>17</sup>

- a) violations of human rights and constitutional rights, particularly those involving irreparable harm;
- b) gender perspective, children, older persons, persons with disabilities;<sup>18</sup> and
- c) persons deprived of liberty.<sup>19</sup>

In principle, the ICJ confirmed that certain adaptations of modalities can be a proportionate response to Covid-19, provided they are based in law, time-limited and demonstrably necessary and proportionate in the local circumstances of the present outbreak. In particular, in considering the consequences of postponement, judges will need to consider the implications for the right to a trial ‘without undue delay’ (ICCPR Art 14(3)(c)) and the right of pre-trial detainees to release if not tried ‘within a reasonable time’ (ICCPR Art 9(3)).<sup>20</sup>

In dealing with the consequences of postponement, where the limitation periods and filing deadlines would not already automatically extend such periods, some courts have amended the relevant laws or enacted an exception. The ICJ cited the measures announced by the [Inter-American Court of Human Rights](#) (IACHR) and the [European Court of Human Rights](#) as best practice in its briefing note. The IACHR adapted its work processes and announced certain exceptional measures to keep its essential operations running during the pandemic, while continuing to monitor the human rights situation in the region as a whole. In the African context, the African Court on Human and Peoples’ Rights resolved in May 2020 to hold its next session virtually,<sup>21</sup> and suspend all time limits currently in progress before the Court from 1 May 2020 to 31 July 2020.<sup>22</sup> The African Commission on Human and Peoples’ Rights (African Commission) also advised Member States to undertake investigations into cases of allegations of ACHPR rights.<sup>23</sup> In contrast, the decision taken in March 2020 to postpone in-person sessions of the UN human rights sessions until at least June 2020 has been criticised by over 30 NGOs.<sup>24</sup> In an open letter published in May 2020, the 30 NGOs highlight the urgent need for UN human rights treaty bodies to monitor States’ compliance with their treaty

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<sup>16</sup> Ibid, 3.

<sup>17</sup> Ibid, 4-5.

<sup>18</sup> See Part VIII below.

<sup>19</sup> Ibid.

<sup>20</sup> ICJ, ‘ICJ Guidance’, 5-6.

<sup>21</sup> ACtHR, [‘African Court Judges hold virtual meeting’](#) and ACtHR, [‘African Court will begin its 56<sup>th</sup> ordinary session on 1 June 2020’](#).

<sup>22</sup> ACtHR, [‘Suspension of time limits due to the measures taken in response to COVID-19’](#).

<sup>23</sup> African Commission, [‘Press Statement on human rights based effective response to the novel COVID-19 virus in Africa’](#).

<sup>24</sup> Joint NGO Letter, [‘UN Human Rights Treaty Bodies During the COVID-19 Pandemic’](#).

obligations during the crisis and to ensure that States – including in declarations of a state of emergency – comply with international human rights standards.

#### IV. Emergencies, Duration and Derogations

International law foresees emergency measures which suspend or derogate from certain civil and political rights in response to significant threats or exceptional situations. Notably, such emergency measures should be avoided when the situation can be dealt with adequately by establishing proportionate restrictions or limitations on certain qualified rights.<sup>25</sup> If suspensions or derogations from a State's human rights obligations are needed to respond to Covid-19, these must be:<sup>26</sup>

- a) Strictly temporary in scope;
- b) The least intrusive limitation required to achieve the stated public health goals (including temporal, substantive and geographical limitation); and
- c) Include safeguards such as sunset or review clauses.

Emergency declarations based on the Covid-19 outbreak must not be discriminatory nor used:

- a) As a basis to target particular individuals or groups, including minorities;<sup>27</sup> or
- b) For any purpose other than to respond to the pandemic. Specifically, they should not be used to stifle dissent or media freedom.<sup>28</sup>

Unlike the ordinary scope for limitations of rights, it is critical that emergency powers are 'time-bound and only exercised on a temporary basis with the aim to restore a state of normalcy as soon as possible.'<sup>29</sup> In the context of Covid-19, OHCHR reiterated that '*as soon as feasible*, it will be important for Governments to ensure a return to life as normal ... recognising that the response must match the needs of different phases of this crisis'.<sup>30</sup> This demands meaningful judicial oversight of emergency measures and temporal and independent review by the legislature of such measures.<sup>31</sup>

Emergency powers also have procedural requirements.<sup>32</sup> For example, international and regional human rights treaties require States to provide formal notification of declarations of

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<sup>25</sup> OHCHR, 'Emergency Measures Guidance', 2. See below Part V.

<sup>26</sup> OHCHR, 'Emergency Measures Guidance'. See generally OHCHR, 'Emergency Measures Guidance'; OHCHR, 'COVID-19 Guidance'; Human Rights Committee, '[Statement on Derogations](#)'; and CoE Toolkit. See also Centre for Global Constitutionalism, '[COVID 19 and States of Emergency](#)'. The Centre of Global Constitutionalism has compiled comparative reports of 74 countries analysing the use of emergency powers from the perspective of democracy, human rights, and the rule of law. From 6 April to 26 May 2020, the Symposium reported on states of emergency and measures taken in response to COVID-19 in 74 countries.

<sup>27</sup> Ibid. See below Part IX.

<sup>28</sup> Ibid. See generally OHCHR, 'COVID-19 Guidance'.

<sup>29</sup> OHCHR, 'Emergency Measures Guidance', 1.

<sup>30</sup> OHCHR, 'COVID-19 Guidance', 2 (emphasis added).

<sup>31</sup> OHCHR, 'Emergency Measures Guidance', 1.

<sup>32</sup> Ibid, 3.

states of emergency.<sup>33</sup> The Human Rights Committee has called for compliance with these aspects ‘without delay’.<sup>34</sup> In addition, governments must inform the affected population of the substantive, territorial and temporal scope of the emergency measures; update this information regularly; and make it widely available.<sup>35</sup>

Some ‘non-derogable’ rights cannot be restricted even during a state of emergency. These include, *inter alia*, the right to life, the principle of *non-refoulement*, the prohibition of collective expulsion, and the prohibition of torture and ill-treatment.<sup>36</sup>

Certain treaties do not permit derogations. For example, under the ICESCR, State obligations associated with the rights to food, health, housing, social protection, water and sanitation, education and an adequate standard of living remain in effect even during situations of emergency.<sup>37</sup> In the African context, the ACHPR does not contain a derogation clause and the African Commission has previously held that a declaration of a state of emergency cannot be invoked as a justification for violations of the African Charter.<sup>38</sup> None of the African human rights bodies have released Covid-19-specific guidance on this topic.

## **V. Criminalisation, Proportionality and Excessive Limitations of Rights**

In the absence of formal states of emergency, States can adopt measures to protect public health that may restrict certain human rights, including, for example, freedom of movement; freedom of expression; rights to privacy; and freedom of peaceful assembly.<sup>39</sup> These restrictions must meet the requirements of legality, necessity and proportionality, and be non-discriminatory.<sup>40</sup> Measures must also be consistent with States’ obligations in relation to the use of force,<sup>41</sup> arrest and detention, and fair trial.<sup>42</sup>

In general, the proportionality of sanctions imposed for violations of restrictive measures to protect public health requires close attention. In particular, criminal sanctions must be subject to strict scrutiny.<sup>43</sup> Criminal penalties for information offences should be avoided.<sup>44</sup> Fines (criminal or civil) should be commensurate to the seriousness of the offence committed.<sup>45</sup>

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<sup>33</sup> Ibid. See generally OHCHR, ‘COVID-19 Guidance’ and CoE Toolkit.

<sup>34</sup> Human Rights Committee, ‘Statement on Derogations’.

<sup>35</sup> OHCHR, ‘COVID-19 Guidance’; OHCHR, ‘Emergency Measures Guidance’.

<sup>36</sup> Ibid. See also African Commission, ‘Press Statement on human rights based effective response to the novel COVID-19 virus in Africa’ and CoE Toolkit.

<sup>37</sup> OHCHR, ‘Emergency Measures Guidance’. See Part VIII below.

<sup>38</sup> African Commission, [‘Main Features of the African Charter’](#).

<sup>39</sup> OHCHR, ‘Emergency Measures Guidance’.

<sup>40</sup> Ibid. See also African Commission, ‘Press Statement on human rights based effective response to the novel COVID-19 virus in Africa’. Specific issues related to these rights are considered in Parts VI and VIII.

<sup>41</sup> See further Part IX.

<sup>42</sup> Ibid.

<sup>43</sup> CoE Toolkit, [3.3].

<sup>44</sup> OHCHR, ‘Emergency Measures Guidance’.

<sup>45</sup> Ibid.



## VI. Privacy, Freedom of Expression and Freedom of Assembly

Measures introduced to combat the pandemic have brought issues regarding the right to privacy, freedom of expression and freedom of assembly to the forefront. International and regional bodies have raised concerns about the threat various health surveillance technologies, including track and trace applications, pose to privacy and in limiting freedoms of expression and assembly.<sup>46</sup> Notably, there is a concerning lack of safeguards in place.<sup>47</sup> To uphold the right to privacy, surveillance and monitoring mechanisms must be specifically tailored to and exclusively used to address the pressing public health need, being strictly limited in duration and scope. Governments must ensure the proper collection and management of sensitive personal data; ensure effective oversight and accountability mechanisms; and develop robust safeguards to prevent governments and companies abusing such mechanisms to data sweep.<sup>48</sup> Left unchecked, surveillance will further discriminate against marginalised persons.<sup>49</sup>

Governments must also address the impact on the rights to freedom of expression, peaceful assembly and freedom of the media. Some governments are using the pandemic as an opportunity to challenge fundamental freedoms, including by clamping down on journalists and whistle-blowers.<sup>50</sup> Notably, the criminalisation of fake news has been used to suppress dissent against criticisms of government response.<sup>51</sup> The free flow of information and independent media is critical to overcome present challenges, with the media being a fundamental mechanism for ensuring accountability. Various bodies have also highlighted that States should also encourage public participation in the Covid-19 response and provide a space for experts, medical professionals, journalists and influencers to speak freely. Given their role in promoting accountability and protecting vulnerable groups, civil society and rights defenders must be protected and not subject to repressive measures. All rights defenders detained without charge should be promptly released.<sup>52</sup> Further, accurate and reliable information should be readily available and accessible to all, provided in multiple and minority languages and accessible means and formats, including for children, the elderly and persons with disabilities. Access to the internet is vital and access must be maintained and expanded. States must too tackle disinformation, including through information campaigns and working with online platforms and the media.<sup>53</sup>

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<sup>46</sup> OHCHR, 'COVID-19 Guidance', 6; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, '[Disease pandemic and the freedom of opinion and expression](#)' [54]-[57]; OAS, '[COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International Experts](#)'; Institute for Human Rights and Business, '[Respecting Human Rights](#)', 12-13;

<sup>47</sup> Bonavero Report 3/2020, 11-12, 14-19

<sup>48</sup> OHCHR, 'COVID-19 Guidance', 6; OHCHR, 'Civic Space and COVID-19', 3-4; CoE Toolkit, 7.

<sup>49</sup> Human Rights Watch, '[Human Rights Dimensions](#)'; Institute for Human Rights and Business, 'Respecting Human Rights', 13.

<sup>50</sup> Special Rapporteur, 'Disease pandemic and the freedom of opinion and expression'; Human Rights Watch, 'Human Rights Dimensions'.

<sup>51</sup> Bonavero Report 3/2020, 11, 69, 76, 100.

<sup>52</sup> OHCHR, 'Civic Space and COVID-19'; Special Rapporteur, 'Disease pandemic and the freedom of opinion and expression' [6], [30]-[40]; Human Rights Watch, 'Human Rights Dimensions'; CoE Toolkit, 6-7; African Commission, '[Press release of the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa on the protection of Human Rights Defenders during the COVID-19 pandemic](#)'.

<sup>53</sup> OHCHR, '[COVID 19 and Disabilities](#)'; OHCHR, '[COVID-19 and Minority Rights](#)', 1-4; Special Rapporteur, 'Disease pandemic and the freedom of opinion and expression' [18]-[29], [41]-[53]; OAS, 'COVID-19:



Against the backdrop of worldwide protests in solidarity with the Black Lives Matter movement, it has been emphasised that peaceful assembly is a ‘fundamental human right’, enabling ‘individuals to express themselves collectively and to participate in shaping their societies’ constituting ‘the very foundation of a system of participatory governance’. Peaceful assemblies must be protected in public and private spaces, and online. Critically, States must not block or hinder internet access in response to peaceful assemblies. Further, face-coverings may be part of the expressive element of peaceful assemblies, serve to counter repercussions, or protect privacy. Surveillance and data collection must not suppress rights or creating a chilling effect.<sup>54</sup>

## VII. Failure to Protect Socio-Economic Rights

Covid-19 is having an enormous impact on socio-economic rights, deepening insecurities and increasing inequalities. International law guidance specifies that States must take action to lessen the enduring effect on lives, livelihoods and the economy, particularly for women, low-wage workers, small business, the informal sector, migrants, and other vulnerable groups who risk being left behind.<sup>55</sup> As already mentioned, the ICESCR does not include a derogations provision. Specifically, the core obligations derived from the rights to food, health, housing, social protection, water and sanitation, education and an adequate standard of living must be upheld even in emergencies.<sup>56</sup> States must devote maximum available resources to the full realisation of economic, social and cultural rights and provide targeted support, prioritising the needs of marginalised groups.

This includes, but is not limited to, the following recommendations outlined by relevant bodies.<sup>57</sup> First, the right to education must be protected in the case of school closures, for example through online learning. The disproportionate impact on girls, migrant children, children without remote learning tools, disabled persons and others experiencing barriers must be addressed. Second, the health and safety of workers must be addressed; providing those in at-risk environments with PPE and ensuring no-one feels forced to work for fear of losing their job or income. Stimulus and social protection packages should be introduced to protect workers, including the informal sector and migrant workers, and those suffering hardship. Third, urgent steps are needed to address food insecurity, including food assistance programs and ensuring mobility and safe conditions for agricultural workers. Governments should also

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Governments must promote and protect access to and free flow of information during pandemic – International Experts’; CoE Toolkit, 6-7; Human Rights Watch, ‘Human Rights Dimensions’; [Bonaverio Report 4/2020](#).

<sup>54</sup> Human Rights Committee, ‘[General Comment No 37 Article 21: Right of peaceful assembly](#)’ [1], [6], [34], [60]-[61].

<sup>55</sup> See UN, ‘[A UN framework for the immediate socio-economic response to COVID-19](#)’. See Part VIII.

<sup>56</sup> Committee on Economic, Social and Cultural Rights, ‘[Statement on the Coronavirus disease](#)’; OHCHR, ‘Emergency Measures Guidance’, 1, 3.

<sup>57</sup> See OHCHR, ‘COVID-19 Guidance’, 1, 5-6, 8-9; Committee on Economic, Social and Cultural Rights, ‘Statement on the Coronavirus disease’ [2]-[9], [10]-[24]; IACHR, ‘[Pandemic and Human Rights in the Americas](#)’, 1-3, [4]-[19]; Human Rights Watch, ‘Human Rights Dimensions’; African Commission, ‘[Press release on the impact of the COVID-19 pandemic on economic, social and cultural rights in Africa](#)’; Bonaverio Report 4/2020. See also ILO, ‘[A policy framework for tackling the economic and social impact of the COVID-19 crisis](#)’.

ensure continued meal provision for children who will miss out on subsidised meals. Free water, soap and sanitiser should be provided to communities and groups lacking them, prohibitions on water cuts for those who cannot pay their bills, and a freeze on evictions and mortgage bond foreclosures. States must not hinder the flow of essential goods and should suspend and lift sanctions that hamper affected countries to protect human rights during the pandemic. Lastly, States should commence negotiations to ensure Covid-19 treatment and vaccines are affordable, available and will benefit their populations.

## **VIII. Discrimination and Vulnerable Persons**

Recognising that Covid-19 knows no boundaries and makes no distinction as to race, ethnicity, religion, or nationality, measures must be applied in a non-discriminatory manner. However, the pandemic has resulted in increased stigmatisation, xenophobia and racism, leading to certain groups and minorities being unable to access adequate healthcare, attacks and threats. It is more important than ever for governments to speak out, prevent and address all acts of discrimination and hate speech against minorities.<sup>58</sup> The pandemic is having a disproportionate impact on vulnerable persons and marginalised groups,<sup>59</sup> including national, ethnic and religious minorities,<sup>60</sup> Indigenous persons,<sup>61</sup> the elderly,<sup>62</sup> LGBTI people,<sup>63</sup> youth,<sup>64</sup> those in extreme poverty, displaced persons and other migrants, persons with disabilities, women, children and those without adequate housing or deprived of their liberty. Many are unable to physical distance or practice safe hygiene, increasing exposure and risks to health and life. Access to health care must be provided to everyone without discrimination, and financial barriers should not inhibit access.<sup>65</sup> Lack of access to work, livelihoods and forms of abuse further heightens risks. Notably, the UK government has been urged to undertake an immediate review of legislation passed in response to Covid-19 to address discriminatory effects, mitigate immediate and long-term economic and social consequences, and meet its duties under the Equality Act 2010.<sup>66</sup>

The specific impacts the pandemic will have on vulnerable and marginalised groups need to be understood and considered in designing responses. This requires their voices to be heard. An inclusive, intersectional approach should be adopted to ensure the equal realisation of rights

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<sup>58</sup> Ibid 4; OAS, '[Permanent Council, The OAS Response to the Covid-19 Pandemic](#)', 3; OHCHR, 'COVID-19 and Minority Rights'; Human Rights Watch, 'Human Rights Dimensions'.

<sup>59</sup> OHCHR, 'COVID-19 Guidance'; IACHR, 'Pandemic and Human Rights in the Americas', 6, 13-18; African Commission, 'Press Statement on human rights based effective response to the novel COVID-19 virus in Africa'.

<sup>60</sup> OHCHR, 'COVID-19 and Minority Rights'.

<sup>61</sup> UNDESA, '[Indigenous Peoples & the COVID-19 Pandemic: Considerations](#)'; African Commission, '[Press Release on the Impact of the COVID-19 Virus on Indigenous Populations/Communities in Africa](#)'.

<sup>62</sup> OHCHR, '[Unacceptable](#)' – UN Expert Urges Better Protection of Older Persons Facing the Highest Risk of the COVID-19 Pandemic'.

<sup>63</sup> OHCHR, '[COVID-19 and the Human Rights of LGBTI People](#)'; CRC and UN experts, '[COVID-19: The suffering and resilience of LGBT persons](#)'.

<sup>64</sup> UN Inter-Agency Network on Youth Development, '[Statement on COVID-19 & Youth](#)'.

<sup>65</sup> OHCHR, 'COVID-19 Guidance', 1-2; Human Rights Watch, 'Human Rights Dimensions'.

<sup>66</sup> See Bonavero Report 4/2020.

and avoid exacerbating existing inequalities.<sup>67</sup> Failure to do so may result in discrimination and violation of positive obligations under the rights to life and health. Guidance from international and regional bodies identifies the key actions States and other stakeholders<sup>68</sup> can take to address the needs of vulnerable and marginalised groups. A cross-section is outlined here.

#### **a. Women and Children**

Covid-19 is having a disproportionate impact on women and girls in a number of ways. This includes impacts on health, safe shelter, education, employment and livelihoods.<sup>69</sup> Gender-based violence against women and girls has increased due to stay-at home restrictions and other measures, limiting the ability to access support or escape from abusers. There are also potential negative effects on sexual and reproductive rights, including access to contraception and pre- and post-natal birth and care. Women and girls are likely to face increased care giving duties, while most frontline workers are women, increasing their risk of exposure and infection.<sup>70</sup> States must protect the rights of women and girls, including by providing PPE and safe and confidential access to services, providing sexual and reproductive health as essential, life-saving services, and protecting women and girls from gender-based violence through awareness campaigns on accessing services and ensuring that services and safe shelters remain available (even if adapted). States must promote policies and social safety nets to minimise the economic impact on women in the informal sector and women now suffering economic hardship, develop economic empowerment strategies, and promote the equal distribution of domestic work and care.<sup>71</sup> Fundamentally, States must guarantee the equal participation of women in designing responses and long-term plans.<sup>72</sup>

Concerns have also been expressed by the CRC about the effect of Covid-19 on children.<sup>73</sup> States should consider child protection needs and children's rights when devising and implementing plans, with the best interests of the child being the primary consideration. States should pay increased attention to areas such as creative solutions for children to enjoy rest, leisure, cultural and artistic activities, online learning, child protective services, and child-friendly quarantine procedures.<sup>74</sup> Critically, states must also take steps to ensure routine vaccinations and health care programmes for children are not disrupted.

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<sup>67</sup> Ibid; WHO, 'Addressing Human Rights as Key to the COVID-19 Response'; OAS, '[COVID-19 Practical Guide](#)'.

<sup>68</sup> See for example Institute for Human Rights and Business, 'Respecting Human Rights'.

<sup>69</sup> OHCHR, '[COVID-19 and Women](#)'; CEDAW Committee, '[Guidance note on CEDAW and COVID-19](#)'; Human Rights Watch, 'Human Rights Dimensions'.

<sup>70</sup> OHCHR, 'COVID-19 and Women'; Human Rights Watch, 'Human Rights Dimensions'.

<sup>71</sup> CEDAW Committee, 'Guidance note on CEDAW and COVID-19'; OAS, 'COVID-19 Practical Guide', ch I; African Commission, '[Press Release of the Special Rapporteur on the Rights of Women in Africa on violation of women's rights during the COVID-19 Pandemic](#)'.

<sup>72</sup> OHCHR, 'COVID-19 and Women'; OAS, 'Permanent Council, The OAS Response to the Covid-19 Pandemic'.

<sup>73</sup> CRC, '[The Committee on the Rights of the Child warns of the grave physical, emotional and psychological effect of the COVID-19 pandemic on children and calls on States to protect the rights of children](#)'.

<sup>74</sup> OHCHR, 'COVID-19 Guidance', 6; Ibid; African Committee of Experts on the Rights and Welfare of the Child, '[Guiding Note on Children's Rights during COVID-19](#)'.

## **b. Refugees, Asylum Seekers, Stateless Persons, Internally Displaced Persons, and Other Migrants**

Around the world, refugees, asylum seekers, stateless persons, IDPs and other migrants are at heightened risk due to the pandemic, subject to stigma and discrimination and excluded in law, policy and practice from accessing rights.<sup>75</sup> Many are in developing regions where health systems are overwhelmed and under resourced, while others live in camps, crowded or unsafe conditions.<sup>76</sup> State policies must guarantee equal access to health services, regardless of nationality or migration status. Accordingly, refugees and other migrants need to be effectively included in national responses.<sup>77</sup> Such an approach is vital not only to protect refugee and migrant rights, but also public health. To ensure effective access to health services, governments should create firewalls between providers and authorities, reassuring migrants they will not face detention, sanction, or deportation when accessing care. Authorities should release immigration detainees into the community, in particular children and families; the suspension of deportations due to travel restrictions means the justification for detaining pending deportation may no longer exist.<sup>78</sup> As some countries have done, migrant status should be regularised, residence and work permits extended, and migrants given access to social services.<sup>79</sup>

Many countries have fully or partially closed their borders, with some suspending the right to seek asylum, declaring their ports unsafe, or failing to rescue migrants at sea. As the UNHCR has made clear, States are obliged to ensure continued access to asylum, while also protecting public health. While States can put measures in place, such as health checks, testing and quarantine, border restrictions must not deny individuals an effective opportunity to seek asylum or violate the obligation of *non-refoulement*. The reception of asylum seekers and processing of protection claims should continue.<sup>80</sup>

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<sup>75</sup> OHCHR, '[COVID-19 and Migrants](#)', 1. See also Kaldor Centre for International Refugee Law, '[COVID-19 Watch: Expert analysis of COVID-19's impact on refugees and other forced migrants, an online hub examining the pandemic and displacement and the world's response](#)'.

<sup>76</sup> See Malman School of Public Health Forced Migration & Health, Cornell Law School Migration and Human Rights Program, The New School Zolberg Institute of Migration and Mobility, '[Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and other Displaced Persons](#)', which outlines a set of principles to inform and guide State action, assist international organisations, and provide a basis for advocacy and education.

<sup>77</sup> UNHCR, IOM, OHCHR and WHO, '[Joint Statement: The rights and health of refugees, migrants and stateless must be protected in COVID-19 response](#)'; OHCHR, 'COVID-19 and Migrants', 1; OAS, 'COVID-19 Practical Guide', ch VII.

<sup>78</sup> OHCHR, 'COVID-19 and Migrants', 3; Human Rights Watch, 'Human Rights Dimensions'.

<sup>79</sup> OHCHR, 'COVID-19 and Migrants', 1-3; Committee on Migrant Workers & UN Special Rapporteur on the Human Rights of Migrants, '[Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants](#)'.

<sup>80</sup> UNHCR, '[Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response](#)'; UNHCR, '[The COVID-19 Crisis: Key Protection Messages](#)'. See also OHCHR, 'COVID-19 and Migrants', 3; OAS, 'COVID-19 Practical Guide', ch VII; AU, '[Press Release: Migration & Mobility in Contexts of COVID-19](#)'.

### **c. Persons Deprived of Liberty**

Prisoners and other persons deprived of their liberty<sup>81</sup> face heightened vulnerabilities and may be in a life-threatening situation due to the pandemic. The virus can spread rapidly in such settings, many detainees have underlying health issues, and health care services may already be subpar. States are thus obliged to take immediate steps to avoid otherwise probable, but preventable, loss of life.<sup>82</sup>

In line with international standards, persons in detention must have access to the same standard of health care as in the community and ongoing access to existing health services.<sup>83</sup> States have been reminded of the absolute nature of the prohibition of torture and inhuman or degrading treatment. Independent monitoring bodies must continue to have access to detention facilities to ensure measures are taken to reduce the real possibility of detainees suffering inhuman and degrading treatment.<sup>84</sup> To minimise the occurrence of the virus in prisons and detention centres and prevent outbreaks, including spread to the general public, states must reduce overcrowding and increase cleanliness and hygiene practices. States should limit deprivation of liberty to a measure of last resort, identify those individuals most at risk within detained populations, implement schemes of early, provisional or temporary release of low-risk offenders, particularly children,<sup>85</sup> and review and reduce the use of immigration detention and closed refugee camps, as has been done in various parts of the world.<sup>86</sup> States must also take into account the fact persons deprived of their liberty often belong to other vulnerable groups who require additional protection measures eg children, the elderly and migrants.<sup>87</sup> Specifically, States must ensure that the human rights of every child deprived of their liberty are upheld. This includes introducing a moratorium on any new child entering detention facilities.<sup>88</sup>

### **d. People with Disabilities**

Relevant authorities must adopt a response that ensures the inclusion, effective participation and accessibility for persons with disabilities, drawing on the experiences of disabled people and related organisations.<sup>89</sup> Persons with disabilities are disproportionately impacted due to attitudinal, environmental and institutional barriers that are reproduced in the Covid-19 response. Various barriers, including access to health services and information, discrimination

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<sup>81</sup> This includes any place where a person is quarantined and not free to leave: SPT, '[Advice provided by the SPT to the National Preventive Mechanism of the United Kingdom regarding compulsory quarantine for coronavirus](#)'.

<sup>82</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, '[Dispatch Number 2](#)'.

<sup>83</sup> OHCHR and WHO, Inter-Agency Standing Committee, Interim Guidance, '[COVID-19: Focus on Persons Deprived of Their Liberty](#)'; Human Rights Watch, 'Human Rights Dimensions'.

<sup>84</sup> European CPT, '[Statement of principles relating to the treatment of persons deprived of their liberty](#)'.

<sup>85</sup> UNICEF & The Alliance for Child Protection in Humanitarian Action, '[COVID-19 and Children Deprived of Their Liberty](#)'.

<sup>86</sup> SPT, '[Advice of the SPT to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic](#)'; UNODC, WHO, UNAIDS & OHCHR, '[Joint Statement: COVID-19 in prisons and other closed settings](#)'.

<sup>87</sup> OAS, 'COVID-19 Practical Guide', ch VIII.

<sup>88</sup> UNICEF & The Alliance for Child Protection in Humanitarian Action, 'COVID-19 and Children Deprived of Their Liberty'.

<sup>89</sup> CRPD & Special Envoy of the UNSG on Disability and Accessibility, '[Persons with Disabilities and COVID-19](#)'; OAS, 'COVID-19 Practical Guide', ch III; Bonaverio Report 4/2020.



in accessing livelihood and income support, increased isolation, and pre-existing health conditions put them at high risk during the health emergency.<sup>90</sup> Looking to the impact the virus has on the right to health, persons living in institutions and the community, on work, income and livelihoods, on education, protection from violence, prisoners, and persons without adequate housing, international and regional guidance outlines several steps States and stakeholders can take, including the following.<sup>91</sup> States should prohibit the denial of treatment on the basis of disability, ensure priority testing of disabled persons presenting symptoms, and identify and remove barriers to treatment. All health and support services required by persons with disabilities must continue. Individuals should also be released from institutions and related facilities, where possible. Within the community, reasonable accommodations should be made for persons with disabilities, refraining from blanket prohibitions on leaving the home and fines. Situations of poverty and economic hardship must be addressed through financial aid, increased benefits and assistance for persons stopping work to care for disabled family members, as well as food provision schemes. Homeless persons with disabilities must be treated with dignity and respect, and offered safe, accessible shelter where available.

## IX. Enforcement Powers and Practice

Law enforcement officials and military personnel have been given extensive powers during the pandemic, accompanied by allegations of police violence and excessive use of force, often directed at the most vulnerable individuals and groups.<sup>92</sup> This has occurred alongside reports of non-compliance by members of the public. Notably, the African Commission is ‘gravely concerned about ... the widespread lack of compliance by the public with the measures adopted by States which regrettably undermine the effort to contain the spread of the pandemic’.<sup>93</sup> Relevant guidance reiterates that excessive use of force is *always* unlawful under international law. Even during an emergency, law enforcement measures must comply with the strict requirements of legality and proportionality, and reasonable precautions adopted to prevent loss of life.<sup>94</sup> Discussion, instruction, and engagement should guide police response. Flouting a restriction on movement does not constitute a ground for excessive use of force and under *no* circumstance, can end with lethal force. Critically, law enforcement must uphold non-discrimination obligations and not further victimise vulnerable groups. Law enforcement institutions and officers should have an understanding of the vulnerability of specific groups.<sup>95</sup> Notably, certain policing methods may lead to the spread of Covid-19, further risking the right

<sup>90</sup> OHCHR, ‘COVID 19 and Disabilities’; OAS, ‘COVID-19 Practical Guide’, ch III.

<sup>91</sup> OHCHR, ‘COVID 19 and Disabilities’; CRPD & Special Envoy, ‘Persons with Disabilities and COVID-19’; CoE Commissioner for Human Rights, [‘Persons with Disabilities Must Not Be Left behind in the Response to the COVID-19 Pandemic’](#); Bonavero Report 4/2020.

<sup>92</sup> Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, [‘Dispatch Number 1’](#); African Commission, [‘Press Release of the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa on Reports of Excessive use of Force by the Police during the COVID-19 Pandemic’](#); Bonavero Report 3/2020, 13, 41-42, 46, 50, 98, 105-106, 120.

<sup>93</sup> African Commission, ‘Press Statement on human rights based effective response to the novel COVID-19 virus in Africa’.

<sup>94</sup> See above Part IV. See also Human Rights Committee, ‘General Comment No 37 Article 21: Right of peaceful assembly’.

<sup>95</sup> OHCHR, ‘Emergency Measures Guidance’, 4-5; Ibid; IACHR, ‘Pandemic and Human Rights in the Americas’ [72]. See above Part VIII.

to life of those already most at risk due to socioeconomic status and institutional racism.<sup>96</sup> Authorities must continue to protect individuals from crime, especially increasing levels of domestic, sexual and gender-based violence, human trafficking, online crime, and falsified medical products.<sup>97</sup>

## **X. Conclusion**

Covid-19 is ‘attacking societies at their core’.<sup>98</sup> To recover from Covid-19, compliance with international law standards of human rights is essential. At the outset, we noted that the Covid-19 pandemic, the nature of State responses, and the guidance published by international and regional bodies is developing. Continuous and regular review of these three moving parts is necessary. In particular, ongoing oversight – in the relevant domestic, regional and international fora – of how States are applying and complying with this international law guidance is of fundamental importance. In addition to securing human rights compliant responses by States through ongoing oversight, given the truly global nature of the Covid-19 pandemic, it is hoped that this oversight can serve an additional function. ‘Global threats require global responses’ and as such, robust multilateral and international cooperation and coordination is needed.<sup>99</sup> States can learn from each other’s best and worst practices in order to safeguard human rights at all stages of the Covid-19 pandemic.

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<sup>96</sup> Ida Sawyer, ‘[New York Protesters Jailed in Crowded, Filthy Conditions](#)’.

<sup>97</sup> CoE Toolkit, 8-9.

<sup>98</sup> UN, ‘[Shared Responsibility, Global Solidarity](#)’, 1.

<sup>99</sup> UN, ‘Covid-19 and Human Rights’, 18.



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